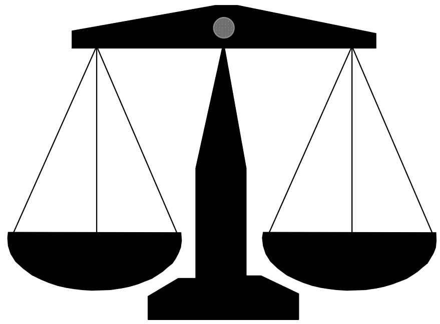
SIGNIFICANT COURT CASES (June 2003 - May 2004)



Grand Victoria Casino & Resort, LP v. Indiana Dept. of State Revenue
789 N.E.2d 1041 (Ind.Tax 2003)

Grand Victoria Casino & Resort, LP and the Department filed cross-motions for summary judgment. Grand Victoria argued that it was entitled to a refund of sales tax paid for: (1) purchases of tangible personal property and services which qualified for the public transportation exemption (45 IAC 2.2-5-61(b)); (2) interstate satellite transmission services; and, (3) the 1999 capital contribution of its riverboat. The Department's issues on summary judgment concerned whether Grand Victoria owed use tax for the 1996 tax year for the purchase of its riverboat: (a) because its tax-exempt leasing of the riverboat ceased in 1999, and/or (b) because its riverboat was unlicensed and therefore required to be registered for use in Indiana. In denying Grand Victoria's first issue for summary judgment, the Tax Court held that Grand Victoria did not meet the public transportation exemption requirements. Grand Victoria was required by law to leave dock before commencing gaming and so the movement of its gamblers—despite the $9 ticket purchase—did not constitute consideration as required by 45 IAC 2.2-5-61(b) since performing one's legal duty cannot be consideration. In granting Grand Victoria's second issue for summary judgment, the Tax Court found that the sales tax imposed pursuant to IC 6-2.5-4-6 for "intrastate" satellite transmissions did not apply to Grand Victoria because their transmissions were "interstate" beginning in Kentucky and terminating in Indiana and thus exempt under the statute. In granting Grand Victoria's third issue for summary judgment, the Tax Court held that the capital contribution was a transfer of property without consideration and therefore not a retail sale subject to sales tax. In denying the Department's summary judgment motion, the Tax Court held that because the riverboat was acquired in an "isolated or occasional sale," the use tax would apply only if the riverboat was a watercraft requiring registration by the State. The Tax Court held that since the Department failed to submit sufficient legal authority regarding the watercraft registration requirement, summary judgment was inappropriate.

Trump Indiana, Inc. v. Indiana Dept. of State Revenue
790 N.E.2d 192 (Ind.Tax 2003)

Trump Indiana, Inc. appealed from a $1.8 million assessment for use tax (including penalties and interest) for 1996 and 1997. Trump and the Department filed cross-motions for summary judgment on the following issues: (1) whether Trump was entitled to the public transportation exemption for its purchase of tangible personal property for its riverboat; (2) whether Trump was entitled to the equipment exemption for its purchase of a hotdog bun warmer and a microwave oven; (3) whether Trump was entitled to a refund of use tax it paid on the 1996 purchase of its riverboat; and, (4) whether Trump was subject the 10% negligence penalty imposed on its use tax deficiency. As to the first issue, the Tax Court denied Trump's summary judgment motion because Trump was required by law to leave dock and transport its customers prior to the commencement of gambling. Consequently, the transportation fee did not constitute consideration as required by 45 IAC 2.2-5-61(b) since performing one's legal duty cannot be consideration. The Tax Court denied Trump's motion for summary judgment on the second issue because the equipment purchased did not meet the production requirements for the exemption (IC 6-2.5-5-3(b)) which in this case necessitated a showing by the taxpayer that the equipment was used for bringing about a chemical change in the food. The Tax Court granted Trump's motion for summary judgment on the third issue and granted the refund of use tax paid because the riverboat was classified as "real property" for property tax purposes. The fourth issue for summary judgment was granted in part and denied in part. Trump was required to pay 10% deficiency penalty for the equipment since it did not meet the exemption requirements but Trump was not required to pay the penalty for the riverboat since it was real property and not subject to use tax. The Department has appealed this decision. The Indiana Supreme Court granted certiorari.

Eric Howland v. Indiana Dept. of State Revenue
790 N.E.2d 627 (Ind.Tax 2003)

Eric Howland appealed the imposition of Indiana's gross retail and use tax (sales tax) on money he received from the installation of satellite dishes during 1991 through 1993. Howland was the sole proprietor of Total Home Entertainment and in connection with this business he sold and installed satellite dish systems. The contracts used by Howland in conducting business with his customers did not separate the installation charges from the charges for the cost of materials and consequently were classified as "mixed" transactions. Thus, the transactions between Howland and his customers constituted unitary transactions because the goods and services were "furnished under a single order or agreement and for which a total *combined* charge or price [was] calculated." IC 6-2.5-1-1(a). Further, services rendered in such transactions are taxable only if the property (goods) transferred and the services are "inextricable and indivisible." "Accordingly, the issue in this case turned on whether Howland's installation services were performed *before* or *after* he transferred title…to his customers." The case concluded that, because Howland's customers expected him to install the equipment in working condition before title passed (thus remaining in Howland), the services were technically performed before the transfer of the property and were subject to sales tax as retail unitary transactions under IC 6-2.5-4-1(e).

North Central Industries, Inc. v. Indiana Dept. of State Revenue
790 N.E.2d 198 (Ind.Tax 2003)

North Central Industries, Inc. claimed that the Department failed to grant it an exemption under IC 6-2.5-5-3(b), which is known as the equipment exemption. North Central purchased a machine which it used to shrink-wrap fireworks for resale as assortment packages. Both parties filed cross-motions for summary judgment on the issue of whether North Central's shrink-wrap machine qualified for this exemption. The exemption is available only when the equipment purchased is used for "direct production or manufacture" of "other tangible personal property." Because the "mere packaging" of the fireworks into an assortment did not constitute a transformation of the package into a new product or new marketable goods, the shrink-wrap machine did not qualify for the equipment exemption. See *Faris Mailing, Inc. v. Ind. Dept. of St. Rev.*, 512 N.E.2d 480. Further, the shrink-wrap process did not "increase the number of scarce economic goods" because the fireworks were sold regardless of the way they were packaged, see *Harlan Sprague Dawley, Inc. v. Ind. Dept. of St. Rev.*, 605 N.E.2d 1222). According to the Tax Court, "North Central does not create a new, marketable product, it merely packages existing fireworks…" Thus, North Central's summary judgment motion was denied because the equipment did not constitute the direct production or manufacture of other tangible personal property as required by IC 6-2.5-5-3(b).

Janie G. Hunt v. *Indiana Dept. of State Revenue*
790 N.E.2d 630 (Ind.Tax 2003)

Janie G. Hunt appealed a determination by the Department which found her personally liable for the withholding of employee taxes in her capacity as president of Hunt's Health Care Center, Inc. (HHC). The sole issue before the Tax Court was whether Hunt was personally liable for HHC's unpaid withholding taxes. The Tax Court noted that under IC 6-3-4-8(a) the test of Hunt's personal liability in the matter was twofold wherein culpability is established by a showing that the individual was an employee or officer and then that the person had the duty to remit the withholding taxes. Because she was the president the first prong was satisfied. The second prong becomes satisfied upon a showing of three factors: (1) the person's position in the power structure, (2) the authority granted to the person, and (3) whether the person actually exercised control over the business' finances. Hunt was the president and sole shareholder and thus was presumed to have the authority required to satisfy the three-factor test. Though this presumption was rebuttable, Hunt failed to do so despite the fact that she claimed to have turned over the day-to-day operations to another individual because she had signed various checks for payment on the withholding taxes. Furthermore, she placed her own funds into the corporation to cover those checks. Hunt's defense of laches was denied because the Tax Court decided that "the Department did not inexcusably delay in seeking to collect the delinquent withholding taxes." The Department's final determination was affirmed.

Joseph Ziegler, Richard Wait, Marceline Wait, Paul Johnson, Phillis Hurd, and Frank Tester v. Indiana Dept. of State Revenue
797 N.E.2d 881 (Ind.Tax 2003)

Joseph Ziegler et al., appealed from the final determinations by the Department which denied their refund claims for income tax paid from 1977-1999. On cross-motions for partial summary judgment, the following issues were in question: (1) whether petitioners' appeal could be maintained as a class action despite the failure to exhaust administrative remedies pursuant to IC 6-8.1-9-7; and, (2) if not, whether IC 6-8.1-9-7 violated Article I, §§ 12 and 23 of the Indiana Constitution. As federal government employees, the petitioners wished to establish the unconstitutionality of IC 6-3-2-3.7. Petitioners also wished to include in the class action all those similarly situated—regardless of whether those persons filed claims for refund with the Department—dating back to 1977 for refunds in excess of one billion dollars. The Tax Court denied the refund claims because pursuant to IC 6-8.1-9-7 the petitioners were required to first present their claims to the Department in order to exhaust the available administrative remedies. On the second issue, the Tax Court decided that the difference in treatment between individual and class-wide relief was justified because the refund process was the only way by which the Tax Court could have jurisdiction to hear the claims. Thus, IC 6-8.1-9-7 did not violate Article I, §§ 12 and 23 of the Indiana Constitution.

Clifford R. Eibeck v. Indiana Dept. of State Revenue
799 N.E.2d 1212 (Ind.Tax 2003)

Clifford Eibeck appealed from a final determination by the Department which assessed tax on personal income derived from a pension fund. The sole issue on appeal concerned whether Eibeck's pension income was subject to Indiana's adjusted gross income tax under IC 6-3-1-1. Eibeck claimed that Title 26 of U.S. Code had not been enacted into positive law. Therefore, Eibeck asserted, because IC 6-3-1-1 (Indiana's adjusted gross income tax law) was based on Title 26, it was also not positive law and hence unenforceable. The Tax Court decided that the distinction between positive and non-positive law was not controlling because Title 26 was contained in the United States Statutes at Large; thus, Title 26 was enforceable. Further, the State has the power to levy and collect taxes as prescribed by the Indiana Constitution. Moreover, IC 6-3-1-8, by the authority of 26 U.S.C. § 61(a)(11), has defined gross income as "all income from whatever source derived, including (but not limited to)…pensions." Thus, Eibeck's pension income was subject to Indiana's adjusted gross income tax under IC 6-3-1-1.

David W. Bucker v. Indiana Dept. of State Revenue
804 N.E.2d 314 (Ind.Tax 2004)

David Bucker challenged the final determination of the Department denying his claim for refund of adjusted gross income tax for the 2001 tax year. His claim rests on the assertion that he "did not have any gross income, as he did not have any remuneration paid to him from any of the specific U.S. sources per 26 C.F.R. § 1.861-8(f)(1) and 26 C.F.R. § 1.861-8T(d)(2)(iii)." Further, "Bucker claim[ed] that because the source of his income was not listed in 26 C.F.R. § 1.861, it did not constitute "gross income" and, therefore, was not taxable." This argument is commonly referred to as the "Section 861 argument" or the "U.S. Sources argument" and has been "unequivocally rejected by every court which has ever considered the issue." Essentially, Mr. Bucker's claim that his wages were not gross income by reason of 26 C.F.R. § 1.861 was denied because "[t]he source rules did not exclude from United States taxation income earned by United States citizens from sources within the United States." *Takaba v. Commissioner of Internal Revenue*, 119 T.C. 285, 295.

Southern Indiana Gas and Electric Company and *Vectren Corporation*, successor in interest to *SIGCORP, Inc.*
804 N.E.2d 877 (Ind.Tax 2004)

Southern Indiana Gas and Electric Co. (SIGECO) et al., appealed the Department's final determination assessing them additional supplemental net income tax liability for 1995 and 1996. The issue involving “throwback” sales concerned whether SIGECO should have paid supplemental net income tax on sales of gas purchased from producers located outside of Indiana (LA, TX, IL) and sold to customers (also located outside of Indiana) via interstate pipelines. Because income was received from sources both within and without Indiana, the Department took the position that SIGECO should be required to pay tax pursuant to IC 6-3-2-2(b) which apportions tax liability for income derived in Indiana. 45 IAC 3.1-1-53(6) governs whether these sales should have been “thrown back” to Indiana. For 45 IAC 3.1-1-53(6) to apply, the following conditions must be met: (a) the taxpayer’s salesman operates from an office in Indiana, (b) makes a sale to purchaser in another state where taxpayer is not taxable, and (c) the property is shipped by third party to purchaser. Upon meeting these conditions, tax will be assessed by the state from which the property is shipped if the taxpayer is taxable in that state. If the taxpayer is not taxable, then the sale will be attributed to Indiana and tax will be assessed accordingly. The Tax Court held that the sales in question did not meet the requirements for application of 45 IAC 3.1-1-53(6) because the gas was shipped by SIGECO and not by a third party. Thus, SIGECO did not have to pay the supplemental net income tax liability. The Department has appealed this decision. Certiorari is currently pending.

Simon Aviation, Inc. v. *Indiana Dept. of State Revenue*
805 N.E.2d 920 (Ind.Tax 2004)

Simon Aviation, Inc. appealed the Department’s imposition of Indiana use tax on aircraft lease payments it made during 1993-1995. Initially, Simon obtained a private ruling (“DRS87-10”) from the Department stating that its lease payments would not be subject to Indiana’s use tax because the aircraft were used primarily in interstate commerce despite the fact that they were hangared in Indiana. However, in 1992 when new case law suggested that the aircraft would be subject to use tax, the Department warned Simon on three separate occasions that renegotiation or renewal of the leases would subject them to tax liability. Simon nonetheless renegotiated the leases and use tax was imposed. Simon presented three alternative arguments: (1) the lease payments were not taxable under DRS87-10; (2) the new liability for use tax constituted a “retroactive change” in the Department’s policy which is prohibited under IC 6-8.1-3-3; or, (3) the lease payments were not taxable pursuant to the Commerce Clause. In response to the first argument, Simon’s renegotiation constituted a change in facts that would not protect it because DRS87-10 was a private ruling and private rulings are entitled to be relied upon only for the specific taxpayer and under specific fact circumstances. 45 IAC 15-3-2(d)(1) and (3). As to the second argument, the Tax Court held that there was nothing “retroactive” about the Department’s treatment of Simon because *both* DRS87-10 and the repeated warnings indicated that a change in facts would constitute a change in tax liability. The Tax Court agreed with Simon as to their third argument and found that Simon was entitled to a refund of use tax paid *up to the amount of sales tax paid in another state* because Indiana’s use tax impermissibly discriminated against interstate commerce for purchases of out-of-state aircraft since credits or setoffs against out-of-state sales taxes previously paid were not allowed.

Aztar Indiana Gaming Corporation v. Indiana Dept. of State Revenue
806 N.E.2d 381 (Ind.Tax 2004)

Aztar Indiana Gaming Corporation was a licensed riverboat operator and operated an excursion gaming boat. Under IC 6-3-2-1 of Indiana’s Adjusted Gross Income Tax Act of 1963, Aztar was required to pay income tax on that portion of its adjusted gross income derived from sources within Indiana. Aztar determined its adjusted gross income by making certain adjustments to its federal taxable income. One of these adjustments required Aztar to “add back any deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level.” Aztar deducted the Riverboat Wagering Tax (“RWT”) it had paid to Indiana pursuant to IC 4-33-13-1 in calculating its federal taxable income for the years at issue. However, because Aztar did not consider the RWT to be a tax based on or measured by income it did not add those taxes back to its federal taxable income when it calculated its Indiana adjusted gross income tax liability. The Department assessed additional adjusted gross income tax and supplemental net income tax liabilities for 1995, 1997 and 1998. On cross motions for summary judgment, the sole issue was whether the RWT was “a state tax ‘based on or measured by income’ for purposes of an add-back provision in Indiana’s adjusted gross income tax law.” Aztar claimed that the RWT was an excise tax not included within the ambit of income taxes. Yet, all cash and property received by Aztar from its gaming operations constituted *income* to Aztar. The Tax Court ultimately found that although it was true that the RWT was an excise tax, it was nevertheless an excise tax that was measured by income. *Indiana Dept. of State Rev. v. Fort Wayne Nat’l Corp.*, 649 N.E.2d 109, 111 (1995). Therefore, summary judgment was granted for the Department. Aztar’s petition for rehearing was pending and has been denied by the Tax Court. Taxpayer has requested a review by the Supreme Court.